STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF NATURAL RESOURCES, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED January 10, 2003
v	No. 229692 Ingham Circuit Court
CLARK REFINING AND MARKETING, INC., Defendant-Appellee/Cross-Appellant.	LC No. 94-077815-CE

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

I. Nature of the Case

Following a bench trial, the trial court awarded plaintiffs $159,620.21 in corrective action costs under the now-repealed Leaking Underground Storage Tank Act (LUST Act).[1] Specifically, the trial court awarded costs for investigating and connecting twenty-seven residential properties to the community water system following a release of benzene, toluene, ethylbenzene, and xylene (BTEX) at defendant's filling station on Sashabaw Road. On appeal, plaintiffs contend that the trial court erred by failing to require defendant to pay all of plaintiffs' corrective action costs and, on cross-appeal, defendant argues that the trial court erred by

[1] The LUST Act, 1988 PA 478, was amended and recodified, MCL 299.831 *et seq*. Plaintiff's claims arise under §12(8) or MCL 299.842(8) which provides:

> The owner or operator, or both, shall be liable to the state for costs that are incurred by the state for taking corrective action or enforcement action pursuant to this act.

The Legislature enacted the Natural Resources and Environmental Protection Act (NREPA), effective March 30, 1995, 1994 PA 451 and, in Part 213, reenacted and recodified the pertinent portion of the LUST Act as MCL 324.21322(8). Thereafter, the Legislature repealed §21322(8) of NREPA by enacting 1995 PA 22, effective April 13, 1995.

requiring defendant to pay more than its share of corrective action costs. We affirm the trial court's rulings.[2]

II. Standard of Review

Plaintiffs claim that the trial court clearly erred in several of its findings of fact. In *Lamp v Reynolds*, 249 Mich App 591, 595; 645 NW2d 311 (2002), this Court held:

> On appeal following a bench trial, a trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake." *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997).

III. Analysis

A. Divisibility of Harm

Plaintiffs first assert that the trial court clearly erred by finding that defendant proved divisibility of environmental harm.

Given the lack of published case law interpreting the LUST Act, the parties agree that this Court should apply the rules set forth in federal cases interpreting the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). It is well established that our state courts view similar, federal court cases as persuasive, although not necessarily binding. *Jones v Sherman*, 243 Mich App 611; 613; 625 NW2d 391 (2001). As the Sixth Circuit observed in *Niecko v Emro Marketing Co*, 973 F2d 1296, 1299 (CA 6, 1992), CERCLA and the LUST contain "virtually identical" language. *Niecko, supra* at 1300 n 3. Accordingly, we find persuasive the reasoning in federal cases interpreting the relevant portions of CERCLA.

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[2] Plaintiffs argue that the trial court erred by failing to find defendant jointly and severally liable for under the LUST Act. However, plaintiffs failed to preserve this issue by raising it before the trial court. Plaintiffs claim that they preserved this issue by asking the trial court to find defendant one-hundred percent liable for plaintiffs' corrective action costs. While plaintiffs argued below that defendant's release caused all of the gasoline contamination in Phase II, they never raised the *legal* argument that defendant must be held liable for all of plaintiff's corrective action costs under the statute because of its joint and several liability scheme. Rather, plaintiffs relied on the *factual* argument that defendant actually *caused* plaintiffs to incur all of the corrective action costs.

Moreover, if plaintiffs believed that the LUST Act imposes joint and several liability for any release contributing to response and corrective action costs, plaintiffs should have raised this argument in a motion in limine, in their opening or closing arguments at trial, at the motion for entry of the order of final judgment or, at the very least, in their motion for relief from judgment. Plaintiffs failed to do so. Our courts have long held that "[i]ssues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Accordingly, plaintiffs have abandoned this argument and we decline to address the issue further.

Both parties cite *United States v Alcan Aluminum Corp*, 964 F2d 252 (CA 3, 1992), in which the Court observed that whether harm is divisible under CERCLA is an "intensely factual" issue. *Id*. at 269. The Court noted that, in proving divisibility of harm in a case involving twenty defendants, "the analysis will be factually complex as it will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue." *Id*. However, the Court held that, if Alcan proved divisibility, consistent with the leading cases,[3] then "it should only be liable for that portion of the harm fairly attributable to it." *Id*.

In their complaint, plaintiffs alleged that contamination at the Sashabaw Road site was commingled and, therefore, indivisible. As the trial court correctly found, defendant refuted this allegation by demonstrating the presence of chlorinated volatile organic compounds (VOCs) at the site and a separate and distinct release from the former Chevron gas station across the street.

Plaintiffs' own witnesses established that chlorinated VOCs can be separately detected and measured and that plaintiffs had, for some time, independently tracked the chlorinated VOCs. While there was a difference of opinion among trial witnesses whether the chlorinated VOCs justified connecting the Phase II houses to community water, the testimony nonetheless made clear that those contaminants were distinguished, measured, monitored, and traced separately from the BTEX released by defendant. Evidence also showed that plaintiffs and their consultant, Eder Associates Consulting Engineers (Eder), incurred costs specifically related to tracking the chlorinated VOCs and that the Michigan Department of Public Health incurred costs for monitoring residential wells, notifying residents of contamination, distributing bottled water and connecting residents to community water. Therefore, because the chlorinated VOCs are distinguishable from BTEX, because plaintiffs relieved defendant of any liability related to chlorinated VOCs, and because plaintiffs clearly incurred corrective action costs to investigate, monitor and protect residents from chlorinated VOCs, under the reasoning of *Alcan*, *Chem-Dyne* and *Thomas Solvent*, the trial court correctly ruled that defendant is not liable for *all* of plaintiff's corrective action costs at the Sashabaw Road site.

Moreover, defendant presented evidence of a separate BTEX leak from the former Chevron station, across the street from defendant's gasoline station. As noted, plaintiffs asserted in their complaint that both defendant and Chevron released gasoline-related compounds and that the two plumes merged into a single "commingled" plume. At trial, plaintiffs retracted this theory and, instead, argued that only one release occurred and it occurred on defendant's property. To rebut this evidence, defendant produced evidence that plaintiffs incurred costs for investigating and monitoring two separate releases, one from defendant's station and one from Chevron. Further, defense witnesses testified that, based on the groundwater flow and the contamination found at Chevron and at other area wells, a distinct BTEX plume clearly emanated from the Chevron station. Furthermore, while the trial experts offered conflicting testimony regarding the direction of groundwater flow at the site and disagreed about how to interpret the levels of BTEX at the Chevron station, it was for the trial court to determine the credibility of the witnesses on these contested issues. This Court gives deference to the trial court's opinion regarding conflicting evidence because the trial judge has the opportunity to

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[3] See *United States v Chem-Dyne Corp*, 572 F Supp 802, 808 (SD Ohio, 1983) and *Kelly v Thomas Solvent Co*, 714 F Supp 1439, 1448-1449 (ED Mich, 1989).

observe the witnesses and, as the finder of fact, the "responsibility to determine the credibility and weight of the testimony." *Bachman v Swan Harbor*, 252 Mich App 400, 430; 653 NW2d 415 (2002). Accordingly, the trial court did not clearly err by finding that defendant showed divisible environmental harm.

B. Post March 31, 1994 Costs

Plaintiffs further assert that the trial court erred by ruling that plaintiffs may not recover corrective action costs after March 31, 1994. We disagree.

Because defendant proved divisibility of environmental harm, the trial court correctly allocated only a portion of plaintiff's corrective action costs to defendant. Unfortunately, plaintiff's evidence regarding its corrective action costs consisted of a simple list of combined expenses since 1986, four or five years before defendant's confirmed BTEX release. As noted, cases addressing contamination under CERCLA emphasize that the apportionment of liability must be determined on a case by case basis. Under the facts of this case, the trial court correctly imposed the March 1994 cutoff date for plaintiffs' damages.

In January 1994, defendant's environmental consultant, ATEC, met with Michigan Department of Natural Resources (MDNR) project manager, Rebecca Taylor, to outline a remedial action plan. According to former ATEC employee Mary Clair Hayden, she specifically told Taylor that defendant wanted to take over the investigation to avoid additional investigation costs to the state. According to the record, Taylor agreed. Thereafter, ATEC submitted a plan for continued monitoring and investigation of the site and Taylor responded by letter in March 1994. Taylor stated that ATEC's plan satisfactorily addressed plaintiff's concerns regarding the BTEX release. The letter further indicates that plaintiffs were turning over the investigation to ATEC and that the state would concentrate on investigating the chlorinated VOCs at the site.

At trial, Taylor retreated from her statements in the letter and testified that, in her opinion, ATEC did not adequately investigate the site. Defendant countered this testimony with evidence that Taylor neither expressed dissatisfaction with ATEC's investigation nor requested modification of ATEC's corrective action plan. Again, given the conflicting evidence on this issue, it was for the trial court to determine the credibility of the witnesses. Clearly, the trial court concluded that plaintiffs relinquished the BTEX investigation to ATEC in March 1994. It also appears that the trial court's decision was based, in part, on its finding that plaintiffs' witnesses were "very untruthful" regarding the extent of defendant's liability for costs incurred at the site.[4]

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[4] Plaintiffs correctly note that the trial court initially considered imposing the later of two cutoff dates, March 1994 or the date of the last residential hookup to the community water system. At the motion to enter the order of judgment, the trial court imposed the March 1994 date because plaintiffs failed to produce evidence at trial regarding the date of the last hookup. At the hearing, plaintiffs attempted to submit new evidence on the issue, but the trial court declined to consider it. Some 2 ½ months later, at the hearing on plaintiff's motion for relief from judgment, plaintiffs discovered and alerted the court to a document (among its dozens of trial exhibits) that showed the date of the final hookup. The trial court denied plaintiffs' motion and declined to change the March 1994 cutoff date. Our review of the record reveals no error in the trial court's

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C. Mathematical Errors

Plaintiffs also contend that, in allocating the corrective action costs, the trial court's arithmetic was incorrect. We agree with defendant that plaintiffs have failed to adequately brief this issue. Plaintiffs do not cite any case law which indicates that the trial court's allocation of costs is "contrary to law." Rather, the crux of plaintiffs' argument appears to be that the trial court's arithmetic was simply "unfair." We disagree.

The trial court constructed a fraction to determine plaintiffs' recoverable corrective action costs. The trial court used 27 as the numerator (the number of houses for which defendant was responsible for costs related to it BTEX release), and used 199 as the denominator, the number of houses within the whole community water extension area at the Sashabaw Road site. Plaintiffs argue that, because they did not attempt to recover for contaminated wells in part of the water extension area, the trial court should not have included those houses in the fraction. However, again, as plaintiffs fail to note, the only proofs plaintiffs presented regarding its corrective action costs included all of the investigation performed at the site from 1986 to 1999. Thus, the expenses plaintiffs sought from defendant included those incurred before defendant owned the property, before the BTEX leak occurred and after the March 1994 cutoff date. Further, the trial court specifically found that defendant proved divisibility of harm and that defendant should only pay hookup and investigation costs for a fraction of the homes in the area, 27 of 199. Based on this evidence and the divisibility of harm, we hold that the trial court's equation to determine defendant's liability was reasonable.[5]

D. Defendant's Responsibility for Twenty-Seven Homes

On cross-appeal, defendant contends that the trial court clearly erred by finding that defendant's release caused plaintiffs to incur corrective action costs for connecting twenty-seven homes to the community water system. We disagree.

Under the LUST Act, an owner is liable for costs incurred by the state in taking "corrective action" necessitated by the release of a regulated substance. See MCL 299.842(8) and MCL 299.843(1). Pursuant to MCL 299.833(4), "corrective action" includes investigation and monitoring as well as "such other actions as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources."

In its bench opinion, the trial court stated that there was a causal relationship between defendant's confirmed BTEX release and the necessity of plaintiffs taking prompt action to

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imposition of the March 1994 cutoff date and the trial court did not abuse its discretion by denying plaintiff's motion for relief from judgment. See *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995).

[5] Plaintiffs misrepresent the record by asserting that they filed a motion for an evidentiary hearing or to reopen the record in order to "separate" the corrective action costs. The record reflects that plaintiffs asked for an opportunity to introduce evidence only of when the last hookup occurred. Accordingly, plaintiffs' claim that the trial court unreasonably denied their request to present proof of expenses is disingenuous and without merit.

protect residents from well water contamination. The trial court also ruled that, while the testimony did not precisely define the groundwater flow at the site, those houses within the migratory path of the southeasterly flow direction were at risk of contamination. Therefore, the court reasoned, the state took reasonable steps to prevent or minimize contamination by connecting the twenty-seven homes to community water. Moreover, the trial court observed that, under the circumstances, it was not incumbent upon the state to test the area for a significant length of time before taking action to protect the public health. Based on our review of the record, we are not "left with a firm conviction that the trial court made a mistake." *Featherston, supra* at 588.

The record reflects that, during trial, most of plaintiff's scientific and geological evidence differed from the scientific and geological evidence offered by defendant. Indeed, the exhibits and testimony conflicted regarding all of the following critical issues: (1) the direction of groundwater flow at the Sashabaw Road site; (2) the speed of groundwater flow; (3) the speed at which BTEX compounds travel as individual contaminants (benzene, toluene, ethylbenzene, and xylene); (4) the depth and breadth of BTEX contamination in the aquifer; (5) the existence of a separate plume emanating from Chevron; (6) the existence and significance of contamination from other, upgradient point sources; (7) where the BTEX plume is located and whether the plume has moved or is moving through the area; and (8) whether defendant's BTEX plume is controlled and contained.

The crux of defendant's argument appears to be that, because defense witnesses testified that, by 1999, they had fully defined and contained the BTEX plume, plaintiff's decision to extend community water in 1994 was unreasonable. However, as plaintiffs note, the trial court's verdict took into account plaintiffs' knowledge *at the time the leak was confirmed* and plaintiffs' obligation to protect the public health. While further testing ultimately may have revealed that the plume was contained or that it was flowing along a slightly different path, we agree with the trial court's conclusion that the state acted properly in hooking up the homes that could foreseeably be affected by the release. All of the twenty-seven hookups for which the trial court imposed liability lie in an area to the southeast of defendant's gas station. By the time the release was confirmed, plaintiffs knew that the groundwater flowed generally to the southeast. Further, defense witnesses testified that the groundwater flow is to the southeast, not to the east or to the south, and plaintiffs' government witnesses testified that they decided to include the homes to the southeast of defendant's station primarily based on the projected migratory path of contamination. Based on this evidence, the trial court reasonably defined the area of defendant's liability.

Defendant argues, however, that widespread chlorinated VOCs caused more of the contamination in the area and actually triggered the need for community water hookups to the disputed houses. Plaintiffs' witness Joseph Lovato and Rebecca Taylor acknowledged the presence of chlorinated VOCs in several residential wells, and testified that this contributed to their decision to extend community water. However, both witnesses also testified that the levels of chlorinated VOCs alone did not threaten the public health. Lovato testified that the MDPH did not go forward with the hookups until after BTEX was found at a monitoring well near defendant's gas station (MW-1). Further, according to these witnesses, the presence of chlorinated VOCs suggested that the residential wells were "vulnerable" to contamination, which placed the wells at higher risk of BTEX contamination.

Several witnesses also testified that the amount of BTEX found at MW-1, seventy feet from defendant's gas station, caused significant concern to the MDNR and the Michigan Department of Public Health (MDPH). Taylor testified that soil samples at MW-1 were so heavily contaminated that they smelled like gasoline. Also, Lovato testified that the level of BTEX at MW-1 was approximately sixty times higher than the drinking water standard. Also, the well contained 300 parts per billion of benzene alone, a highly toxic carcinogen. Because of the relatively close proximity of the twenty-seven homes and based on the groundwater flow information at the time, the trial court properly ruled that plaintiffs acted reasonably by hooking up those homes to community water.

We are not persuaded by defendant's assertion that, because the trial court accepted the two-house buffer zone standard, it erred in imposing liability for the twenty-seven hookups. At trial, Lovato and Graham testified that the MDPH generally designates a health advisory area by applying a "two-house buffer zone," including within the area any two houses lying next to a contaminated well. The trial court acknowledged that the two-house buffer zone is a reasonable standard; however, the record is also clear that, based on the disputed geographic contours at the site, following a strict two-house buffer rule would have been impracticable when plaintiffs extended community water to the twenty-seven homes. Also, as plaintiffs note, the trial court viewed the state's actions somewhat flexibly by imposing liability for homes lying downgradient from the point source. In light of plaintiff's important obligation to protect the public health, this was reasonable.

We further observe that the trial court's designation of the area of liability was made more difficult[6] by the numerous types of contamination found at the site, the multiple point sources and potentially responsible parties, the varying levels of contamination both upgradient and downgradient from the site, a prior confirmed release of BTEX in the area and evidence supporting a prior release at Chevron, contamination emanating from the old stone house and, possibly, from Dervage Dump, and the twenty-plus years of investigation of all of this contamination. However, given the high levels of BTEX found in the well near defendant's station and in various geoprobe samples surrounding the site, plaintiffs were compelled to take some corrective action to prevent or mitigate public injury. Clearly, plaintiffs did not have the benefit of hindsight or the luxury of months of testing and modeling the area when it exercised its obligation to protect the public. Under the circumstances, we agree with the trial court that plaintiffs acted reasonably with regard to the disputed twenty-seven wells.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski

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[6] The Court would observe that the trial court took great pains to sort out complex data to arrive at a result that kept faith with the law and the purposes of the statute.